FILED
FEB 16 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1955.

No. 694.

SAXONY CONSTRUCTION COMPANY,
Appellant,

v.

BOARD OF SUPERVISORS OF MARPLE TOWNSHIP,
Appellee.

Statement as to Jurisdiction.

Appeal from the Court of Quarter Sessions of Delaware County, Pennsylvania.

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STATEMENT AS TO JURISDICTION.

Appellant Saxony Construction Company submits herewith its statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Court of Quarter Sessions of Delaware County, Pennsylvania, of June Sessions, 1953, Misc. Quarter Sessions Docket A-18, page 437.

THE OPINIONS BELOW.

The adjudication and decree nisi of the Court of Quarter Sessions of Delaware County, Pennsylvania, dismissing appellant's appeal from the order of the board of supervisors of Marple Township, and the opinion and final decree of that Court dismissing exceptions to the adjudication and decree nisi are not reported. Copies of the adjudication and the opinion of the Court of Quarter Sessions appear *infra* as Appendix A and Appendix B, respectively.

The opinion of the Superior Court of Pennsylvania dismissing the appeal to that court for want of jurisdiction to consider the case on its merits, is reported at 178 Pa. Super. 132, 113 A. 2d 342. A copy of the opinion appears *infra* as Appendix C.

BASIS OF JURISDICTION.

1. This is an appeal from a decision of the Court of Quarter Sessions of Delaware County, Pennsylvania, affirming an order of the board of supervisors of Marple Township. The order of the board of supervisors was made pursuant to authority granted by the Second Class Township Code of Pennsylvania, Act of May 1, 1933, P. L. 103, Art. XII-A, § 1206-A (as amended by Act of May 24, 1951, P. L. 370, § 16), 53 Purdon's Pa. Stat. § 19093-1256; Act of May 26, 1939, P. L. 235, § 1 (as amended by

Act of July 10, 1947, P. L. 1481, § 17), 53 Purdon's Pa. Stat. § 19093-1140. The board of supervisors imposed upon appellant the obligation to install a network of useless, dead-end sewer lines in a residential land development which was to be served by a complete system of on-site sewage facilities consisting of cesspools and septic tanks. In accordance with the procedure prescribed by the Second Class Township Code, *supra,* and the Act of July 18, 1935, P. L. 1299, § 1 (as amended by Act of July 10, 1947, P. L. 1481, § 17), 53 Purdon's Pa. Stat. § 19093-1141, an appeal was taken by appellant to the Court of Quarter Sessions of Delaware County, Pennsylvania.

2. The Court of Quarter Sessions of Delaware County, Pennsylvania, entered its adjudication and decree nisi affirming the order of the Board of Supervisors on December 18, 1953. On April 27, 1954, that Court handed down its opinion and final decree dismissing appellant's exceptions to the adjudication and decree nisi. An appeal to the Superior Court of Pennsylvania was dismissed on April 18, 1955. A petition to the Supreme Court of Pennsylvania for allowance of an appeal was refused on May 24, 1955. Appellant's petition to reconsider the refusal of the appeal from the Superior Court was denied by the Supreme Court of Pennsylvania on September 29, 1955. Thereupon the decision of the Court of Quarter Sessions of Delaware County became final. Notice of appeal to this Court was filed with the Clerk of the Supreme Court of Pennsylvania on December 21, 1955.

3. The jurisdiction of this Court, upon appeal, is conferred by 28 U. S. C. A. § 1257(2). Appellant challenged the validity of the order of the board of supervisors of Marple Township, a "statute of a state" within the meaning of that section of the Judicial Code, on the ground that it is repugnant to the Constitution of the United States.

The decision of the highest state court which passed upon the Federal question affirmed the validity of the order.

4. Cases believed to sustain the jurisdiction of this Court on appeal include:

(a) As to 28 U. S. C. A. § 1257(2): *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935); *Ex parte Williams*, 277 U. S. 267, 272, 48 S. Ct. 523, 526, 72 L. Ed. 877, 879 (1928); *Poulos v. New Hampshire*, 345 U. S. 395, 402, 73 S. Ct. 760, 97 L. Ed. 1105, 1112 (1953); *Atchison, Topeka & Santa Fe Ry. Co. v. P. U. C. of California*, 346 U. S. 346, 348-349, 74 S. Ct. 92, 94, 98 L. Ed. 51, 57-58 (1953).

(b) As to the time for appeal under 28 U. S. C. A. § 2101(c): *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 36-37, 14 S. Ct. 4, 6, 37 L. Ed. 986, 988 (1893); *American Ry. Express Co. v. Levee*, 263 U. S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923); *Bowman v. Loperena*, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177 (1940); *Gorman v. Washington University*, 316 U. S. 98, 62 S. Ct. 962, 86 L. Ed. 1300 (1942).

5. The order of the board of supervisors of Marple Township, the "statute" involved within the meaning of 28 U. S. C. A. § 1257(2), has not been officially reported. It is recorded in the Marple Township minute book with the minutes of the regular monthly meeting of the board of supervisors held April 6, 1953, as follows:

> "The Board approved a revised plan for Section 'K' of Rose Tree Woods, by Saxony Construction Company with the conditions that standard improvements be installed throughout the tract and that sanitary sewers be placed in the streets to be capped until a trunk line is available with cesspools and septic tanks located advantageously for future sewer connections."

QUESTIONS PRESENTED.

1. What are the constitutional limitations upon the police power of a state as applied to the regulation of land development?

2. In the regulation of land development, may a state require a landowner to make burdensome improvements which are unrelated to the public health, safety and general welfare?

3. Is the legislative order of a municipality requiring appellant to install useless, dead-end sewer lines in the streets of its land subdivision so arbitrary and unreasonable as to be repugnant to the due process clause of the Fourteenth Amendment?

STATEMENT OF THE CASE.

1. *Facts.* Appellant Saxony Construction Company is the owner of a thirty acre tract of land in Marple Township, Delaware County, Pennsylvania. On April 6, 1953, it applied to appellee, the township board of supervisors, for approval of a plan for subdivision and development of the tract as forty-eight single-residence lots. The plan provided, inter alia, for installation of on-site sanitation facilities consisting of septic tanks and cesspools. Appellee refused to approve the plan unless appellant would in addition install useless dead-end sanitary sewer lines throughout the subdivision. Appellee did, however, permit construction and occupancy of the dwellings, served by septic tanks and cesspools alone in accordance with the subdivision plan submitted, on the condition that no streets or cartways will be completed until this appeal is finally determined.

There is no trunk sewer line in Marple Township to which the local sewer system in appellant's tract could be connected. The only existing trunk sewer line in the entire

drainage basin in which the tract is contained lies in another township, four miles away. This trunk line neither enters nor touches the borders of Marple Township. It is separated from Marple Township by the territories of two other townships. It was constructed and is owned and controlled by the Central Delaware County Sewer Authority, a municipal authority organized and controlled by certain municipalities in the county, but not including Marple Township. Although it has been contemplated that this sewer authority's system will eventually be enlarged to serve the entire drainage basin in which it lies, including that part of Marple Township containing appellant's tract, no official action of any kind has been taken to effectuate the extension of the sewer trunk lines to this area.

2. *Proceedings.* In accordance with Acts of May 1, 1933, P. L. 103 and May 24, 1951, P. L. 370, § 16, 53 Purdon's Pa. Stat. § 19093-1256, and Acts of July 18, 1935, P. L. 1299, § 1, May 26, 1939, P. L. 235, § 1 and July 10, 1947, P. L. 1481, § 17, 53 Purdon's Pa. Stat. §§ 19093-1140, 19093-1141, an appeal was taken by appellant from the order of appellee to the Court of Quarter Sessions of Delaware County.

The ground of the appeal to the Court of Quarter Sessions was that the order was arbitrary and unreasonable in that it bore no reasonable relation to the public health, safety and the general welfare, and, therefore, exceeded the municipality's lawful authority. In conformity to the practice in Pennsylvania of pleading factually, the petition to the Court of Quarter Sessions contains no reference to the due process clause of the Fourteeth Amendment. However, appellant's reliance upon the Fourteeth Amendment in taking the appeal appeared by necessary implication when it pleaded that the order was arbitrary and unreasonable. In Pennsylvania practice the courts recognize and apply the statutes and constitutional provisions applicable to the facts as pleaded.

In the course of the hearing on the appeal, the Court of Quarter Sessions recognized the constitutional issue in the following statements by the Trial Judge:

> "If this is so far out as to be nothing but arbitrary, then of course we would not sustain it, but you are going to have to go pretty far as far as I am concerned. You are going to have to show this is pretty unreasonable and it has no connection or relationship at all with the police power. . . ."[1]
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> * * *
>
> ". . . I don't see that this makes any difference because if this is a proper exercise of the police power the fact that they did or did not observe it some other place does not in any way affect the township's right to observe it now if they want to."[2]

That the decision of the Court of Quarter Sessions turned on the constitutional question appears in the following excerpt from its opinion:

> ". . . the answer to the problem is found in the fundamental law controlling the police power and its application to municipal improvements designed to protect the public health, safety, morals and welfare. The authority is recognized, but how it is exercised may at times be questioned."[3]

Upon the appeal to the Superior Court of Pennsylvania, both in oral argument and in the printed briefs, the principal argument was entitled "The Township's action exceeds the 'police power' and violates constitutional guarantees of freedom of use of property". The authorities cited included: *Euclid v. Ambler Realty Co.*, 272 U. S. 365,

1. Record certified to this Court by the Supreme Court of Pennsylvania, pp. 18-19. (Hereinafter referred to in these footnotes as "Record".)
2. Record, pp. 81-82.
3. Record, p. 174; Appendix B, *infra*, p. 25.

47 S. Ct. 114, 54 A. L. R. 1016, 71 L. Ed. 303 (1926), and *Truax v. Corrigan*, 257 U. S. 312, 338, 42 S. Ct. 124, 131, 66 L. Ed. 254, 265 (1921).[4] In its petition to the Supreme Court of Pennsylvania for allowance of an appeal from the action of the Superior Court, appellant stated the question as follows:

> "Does the action of the Board of Supervisors of Marple Township constitute a deprivation of Petitioner's property without due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, by imposing a condition upon Petitioner's use of its property which is arbitrary and unreasonable, bearing no reasonable relation to the police power?"[5]

In its petition to the Supreme Court of Pennsylvania to reconsider the refusal of an appeal from the Superior Court, appellant pleaded:

> "This case 'involves the construction or application of the Constitution of the United States' in the question, Was petitioner deprived of its property without due process of law by the imposition of onerous burdens upon its land development plan?"[6]

The Court of Quarter Sessions was the highest court to pass upon the constitutional question in this case. However, in order to determine that the decision of that court was the final decision on the merits, it was necessary to proceed through the Superior and Supreme Courts of Pennsylvania. The statute governing appeals from orders of the board of supervisors provides that the decision of the Court of Quarter Sessions shall be "final". Notwithstanding similar statutory provisions in other cases, the appellate courts of Pennsylvania have granted full review on

4. Briefs in the Superior Court of Pennsylvania certified to this Court, pp. 8-18.
5. Record, p. 188.
6. Record, p. 196.

the merits in a number of them. Appellant relied on this line of cases in taking its appeal to the Superior Court. The Superior Court, however, applied another line of cases construing similar statutory language and held that it lacked jurisdiction to consider the merits, including the constitutional question. Accordingly, the appeal was dismissed.

Until the decision of the Superior Court in the present case, which appears at 178 Pa. Super. 132, 118 A. 2d 342, the distinction between the two lines of cases, one granting full review and the other limited review of procedural regularity, appeared to depend upon the substantive rights involved. In those cases where property rights and questions of due process were to be determined, full review had been consistently given by the appellate courts. In cases involving mere privileges, review was limited to procedural matters. In no case had a full review been denied where constitutional issues were raised. The Superior Court, in its opinion, did not reconcile the manifest conflict between the two lines of decisions. Nor has any other decision in Pennsylvania done so.

Appellant then petitioned the Supreme Court of Pennsylvania for allowance of an appeal in reliance upon the Pennsylvania Act of June 24, 1895, P. L. 212 § 7(e), 17 Purdon's Pa. Stat. § 190, which makes an appeal from the Superior Court to the Supreme Court a matter of right in cases involving the application of the federal or state constitutions or the jurisdiction of the Superior Court. The petition to the Supreme Court was refused by order entered May 24, 1955. On June 16, 1955, on the recommendation of the Chief Justice, appellant filed with the Supreme Court of Pennsylvania a petition to reconsider its refusal of the appeal. After consideration the court denied the petition by order entered September 29, 1955. This order constituted a final determination that the Court of Quarter Sessions of Delaware County was the highest court in the State in which a decision on the constitutional questions in this case could be had.

THE FEDERAL QUESTION IS SUBSTANTIAL.

The order of the board of supervisors of Marple Township violates the due process clause of the Fourteenth Amendment. Building restrictions imposed by a municipal authority, like zoning regulations, are an interference with private property rights which can only be justified as an exercise of the police power. Such restrictions, if they bear no substantial relation to the health, safety or general welfare of the community, are repugnant to the due process clause of the Fourteenth Amendment. *Washington ex rel. Seattle Trust Co. v. Roberge,* 278 U. S. 116, 49 S. Ct. 50, 86 A. L. R. 654, 73 L. Ed. 210 (1928); *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 387, 47 S. Ct. 114, 118, 54 A. L. R. 1016, 1024-1025, 71 L. Ed. 303, 310 (1926); *Welch v. Swasey,* 214 U. S. 91, 105, 29 S. Ct. 567, 570, 53 L. Ed. 923, 929 (1909).

The order of the board of supervisors requires appellant to construct a network of sewer lines in the lots and streets of a residential development which is being served by on-site sewage facilities. There is no trunk sewer main into which these lines could empty, and they would, therefore, be utterly useless. It is for that reason an unconstitutional interference with appellant's property rights. Useless sewer lines cannot protect or promote the health, safety or general welfare. It may be *convenient* for the municipality to require the installation of such facilities in the course of constructing a development, rather than have them installed later when and if the municipality provides a trunk sewer system in the area. However, this Court has held that public convenience, unrelated to health or safety, will not support the use of the police power to require the private construction of expensive improvements. *Nashville, Chattanooga & St. Louis Ry. v. Walters,* 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949 (1935); *Chicago, St. Paul, Minnepolis & Omaha Ry. v. Holmberg,* 282 U. S. 162, 51 S. Ct. 56, 75 L. Ed. 270 (1930).

As applied particularly to appellant, the question is whether the order by appellee is an unconstitutional restraint upon appellant's freedom to use its property. In its full dimension, the question is whether states and local governments, in regulating land development and use, are in fact limited to such restraints as are substantially related to the health and safety of the general public, as the previous decisions of this court have held.

This is a period of rapid economic expansion. In the outlying areas adjacent to the urban centers and along the expressways, there is strong pressure for the conversion of agricultural land to residential, commercial and industrial uses. Throughout the country rural and semi-rural municipalities in these outlying areas are subjected to the almost explosive force of the expanding urban centers. Many such rural municipalities are meeting this force with understandable conservatism. They do not welcome the influx of city-dwellers and the concentration of housing, shopping facilities and other adjuncts of suburbia. They seek to halt the sudden multiplication of their population and the transformation of their rural countrysides. To this end they are resorting to more and more extreme measures. In the guise of regulating such obvious factors of health and safety as sanitary systems and density of development, they are imposing prohibitive burdens and restrictions upon land development. The purpose and effect of such regulation is not to safeguard the health and safety of the community, but to preserve the status quo. Regulation for this purpose clearly transgresses the proper boundaries of interference with the freedom of the individual in the use of his property. The fact that reasonable and appropriate controls over land development will inevitably interfere to some degree with the freedom of the property owner does not ipso facto invalidate the controls. That is an incident of the proper exercise of the police power. But there must be an unmistakable definition of the line between such constitutional regulation and the misuse of regulatory devices

to arrest normal and proper expansion of urban areas under sound and reasonable restraint. Since the *Seattle Trust Company, Euclid* and *Welch* cases, *supra,* increasing numbers of land owners have been subjected to such arbitrary and unreasonable burdens throughout the areas into which the cities are now expanding.

For these reasons the federal questions here presented are of very substantial proportions, within the meaning of *Zucht v. King,* 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922); *Milheim v. Moffat Tunnel Improvement District,* 262 U. S. 710, 716-717, 43 S. Ct. 694, 696, 67 L. Ed. 1194, 1199 (1923), and the rules adopted by this court.

CONCLUSION.

Appellant respectfully submits that this appeal brings before this court federal questions under the Constitution of the United States which are of far-reaching importance in terms of legal principles generally and of serious practical impact upon appellant as a landowner and upon landowners generally, and that the foregoing discussion demonstrates that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPENDIX A.

IN THE COURT OF QUARTER SESSIONS OF THE PEACE IN AND FOR THE COUNTY OF DELAWARE, PENNSYLVANIA.

APPEAL OF SAXONY CONSTRUCTION COMPANY FROM REFUSAL OF THE BOARD OF SUPERVISORS OF MARPLE TOWNSHIP TO APPROVE A CERTAIN SUBDIVISION PLAN.	Misc. Q. S. Docket A-18 Page 437. June Sessions, 1953.

ADJUDICATION.

This is an appeal by a property owner from the refusal of the Board of Supervisors of Marple Township to approve without qualification a subdivision plan of its property. Testimony was taken before Ervin, P. J., on June 10 and 11, 1953. Both parties have submitted requests for findings of fact, conclusions of law and briefs in support thereof.

From the testimony, exhibits and requests we make the following

FINDINGS OF FACT.

1. Saxony Construction Company (hereinafter called owner) is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business at 8 West Baltimore Avenue, Lansdowne, Delaware County, Pennsylvania.

2. The Township of Marple (hereinafter called township), is a township of the second class situate within Delaware County, Pennsylvania.

3. Saxony Construction Company is the legal owner of a certain tract or piece of ground situate in the Township of Marple, Delaware County, Pennsylvania, which is described more particularly on a certain plan called Section "K" Rose Tree Woods, made by G. D. Houtman,

Civil Engineers, a copy of which is filed of record in the case.

4. The tract contains forty-eight lots of at least 12,000 square feet each and is situated in the Trout Run Outfall West of Sproul Road and North of Cedar Grove Road in Marple Township.

5. Owner also owns an adjoining area which can be subdivided into five additional lots.

6. Section "K" of Rose Tree Woods is an area that is tributary to Trout Run and Whiskey Run, both of which drain into Crum Creek, a stream, the water from which is impounded by the Philadelphia Suburban Water Company for domestic and commercial purposes by the residents of Delaware County.

7. The tract, in most part, is located in R-1 zoning district which requires 12,000 square feet minimum area per lot. The appellant intends to build 3 bedroom, single family homes selling for $15,250.00.

8. On March 17, 1953, the said plan of Section "K" was approved by the Delaware County Planning Commission.

9. On April 6, 1953, owner submitted to township the aforesaid plan for approval in accordance with the Second Class Township Code as amended last by the Act of July 10, 1947, P. L. 1481, Section 17, et seq, and Ordinance No. 49-1, enacted and ordained March 17, 1949, of the Township of Marple.

10. At the said meeting on April 6, 1953, the said plan was approved by the Supervisors of Marple Township, provided that a sanitary sewer be installed by Saxony Construction Company within the boundaries of the streets appearing in the said plan, however, the supervisors agreed to issue building permits for the contruction of twelve homes in the tract on condition that streets and cartways should not be constructed until this appeal should be heard

and disposed of by final judgment by a court of final resort and jurisdiction.

11. It is the policy of Marple Township to require sanitary sewers for all homes to be constructed on a lot area of less than 20,000 square feet.

12. In R-C zoning district, which requires a minimum lot area of 20,000 square feet, the Supervisors of Marple Township permit the construction of homes with cesspools or septic tanks and without sanitary sewer lines.

13. At the present time, there are no sewage disposal facilities, such as trunk lines and laterals to which a sewage system installed in Section "K" can be connected.

14. The most feasible sewer connection for Section "K" is connection with the Central Delaware County Sewer Authority (hereinafter called authority) line.

15. The present terminus of the authority's pipe line is at the intersection of the Red Arrow Trolley Line and Crum Creek in Springfield Township.

16. To extend the present terminus for service to Section "K" requires construction of 6700 feet of pipe through Springfield and Nether Province Townships; then 5300 feet of pipe through Marple Township to the intersection of Crum Creek and Trout Run; then 12,000 feet of pipe to Section "K", a total distance of approximately 24,000 feet or four miles.

17. In the spring of 1952, Marple Township initiated proceedings to bring all the municipalities tributary to Crum Creek together for the purpose of studying sanitary sewer problems in that area and to find a solution thereto.

18. On July 22, 1952, representatives of Springfield Township, Newtown Township, Upper Providence Township, Marple Township, Nether Providence Township, Swarthmore Borough, representatives of the Central Delaware County Sewer Authority, and a representative of the

Delaware County Planning Commission, and of the State Sanitary Water Board met to confer about the sanitary sewer problems in the Crum Creek Watershed.

19. The said group, after organizing, requested Damon and Foster, Civil Engineers, the Delaware County Planning Board and the State Sanitary Water Board to make a joint engineering study of ways and means of extending the existing Crum Creek Interceptor sewer, owned and operated by the Central Delaware County Sewer Authority, up the Crum Creek Valley to reach the municipalities in the upper portion of the watershed.

20. Central Delaware County Sewer Authority has plans to extend the trunk line 5300 feet to the Springfield Township line but no starting date or commitments have been made by the authority.

21. The construction of a sanitary sewer from the present interceptor sewer terminus to Section "K" would require approximately from 120 to 140 days.

22. The present Central Delaware County Authority Sewage treatment plan, is designed to have a capacity to accommodate a 70,000 population.

23. The said interceptor sewer was designed and is sufficiently large to accommodate and meet the sanitary sewer requirements of the up stream areas.

24. Preliminary engineering and related studies for the extension of the said interceptor sewer are now being made and have progressed without delay.

25. At the present time there is no provision in the budget of township for the construction of a sewer line to accommodate Section "K."

26. At the present time there are no ordinances or minutes relating to legislation by township for the construction of a sewer line to accommodate Section "K."

27. At the present time township has not attempted to obtain rights of way for the construction of a sewer line to accommodate Section "K."

28. The number of homes in the Crum Creek Watershed has increased from approximately 100 in 1949, 715 in 1953 (at time of hearing) and is estimated to increase to a potential of 4400 houses with a 14,000 population warranted by present zoning.

29. The cost of a cesspool will be approximately $300.00.

30. The estimated cost of constructing sanitary sewers within Section "K" before streets are constructed is $10,100.00 or approximately $210.40 per each of the 48 lots within it.

31. If such installation is after the streets are constructed, the cost will be at least $1½ per foot of frontage additional, aside from the then damage to paved cartways.

32. Owner has graded a large portion of Section "K" to solid rock, pushing the earth to other areas within Section "K" to various depths up to six feet.

33. Before being disturbed by grading the geological structure of the soil consisted of a shallow layer of top soil, several feet of decomposed mica schist, below which is undecomposed mica schist, which is hard rock, massive, tight and very deep.

34. Test borings in Section "K" show that the layer of decomposed mica schist is very porous and that sewage from cesspools would descend rapidly to the top of the undecomposed mica schist, which is impervious; that the soil bacteria would have little chance to work on the sewage and that it would run along the top of the undecomposed mica schist in practically a pure state and would be discharged into Trout Run in a few hours.

35. The average soil in Section "K" absorbs water at the rate of approximately 21 gallons per square foot.

36. The average consumption of water in the average home is 150 gallons per day.

37. The area has developed so rapidly that it is reasonable municipal planning to require sanitary sewers to be constructed within the development and before streets are constructed, notwithstanding the fact that trunk lines are not yet beyond the planning stage.

38. Under all of the evidence, it is not unreasonable, arbitary or capricious to require the construction of sanitary sewers within a development prior to the approval of a subdivision plan.

DISCUSSION.

This in an appeal by a property owner from the refusal of the Board of Supervisors of Marple Township to approve without qualification a subdivision plan of its property. The qualification in question was the requirement by the Supervisors that a sanitary sewer be installed by the appellant within the boundaries of the streets appearing in the plan. The subdivision plan submitted showed the appellant was the owner of forty-eight losts of at least 12,000 square feet each, which are situated in the Trout Run Outfall Watershed. Trout Run and Whiskey Run both drain into Crum Creek, the water from which is impounded by the Philadelphia Suburban Water Company for domestic and commercial purposes by the residents of Delaware County. It is the policy of Marple Township to require sanitary sewers for all homes to be constructed on a lot area of less than 20,000 square feet. It does permit the construction of homes with cesspools or septic tanks if the lot area is in excess of 20,000 square feet. The authority upon which the Township acted can be found in Article XII-A, which was added to the Second Class Township Code by the Act of May 24, 1951, P. L. 370, Sec. 16.

Sec. 1206-A (c) (53 PS 19093-1256) is as follows:

"*Before approving* any subdivision plan for recording, the board of township supervisors shall either require that the necessary grading, paving and other street improvements, including, where specified by the board, curbs, sidewalks, street lights, fire hydrants, water mains, sanitary sewers and storm sewers, shall have been installed in strict accordance with the standards and specifications of the township, or that the township be assured by means of a proper completion guarantee, in the form of a bond or the deposit of funds or securities in escrow sufficient to cover the cost of the required improvements, as estimated by the township engineer or township supervisors, that the said improvements will subsequently be installed by the owner."

The appellant, however, contends that the requirement is arbitrary and unreasonable in this case because of the fact that at the present time there are no sewage disposal facilities such as trunk lines and laterals to which a sewage system installed in this property can be connected. The most feasible sewer connection is with the Central Delaware County Sewer Authority, the present terminus of which line is approximately four miles away. However, since the spring of 1952 Marple Township, together with other municipal subdivisions, the Delaware County Planning Commission and the Sate Sanitary Water Board, have been making joint engineering studies of the ways and means of extending the Central Delaware County Sewer. It is true that these studies are still in the planning stage but they are far beyond the "dream" stage. The enormous growth of the territory involved indicates that the extension of the sewer is a necessity and that it is only a question of time until it must become a reality. The question before the Court, therefore, is whether the Supervisors of Marple Township must wait until it becomes a reality before re-

quiring subdivisions to connect with it or whether they can require developers to be in a position to connect with it at that time. It is clear that it is not only cheaper to lay sewers before streets are constructed than it would be to open a street after it was once laid but it is also a wise precaution since the opening of streets disrupts traffic and impairs the operation of fire equipment, etc.

In order not to prevent the appellant from having the present use of its property, the Township has agreed to the construction of homes at the present time by the installation of cesspools as a temporary measure. The appellant complains that this is double expense. However, when we look into the future we find that this additional expense is only being accelerated. It is true that at that time the builder would probably be out of the picture and that the subsequent expense of the cost of a sanitary sewer would then devolve upon the buyers of the properties. However, any reasonable buyer with knowledge of the circumstances would certainly place a higher present value on a property where the sanitary sewer was already laid than he would for one which he knew would be subject to a future assessment for such facility.

Both parties have referred to the case of Appeal from Radnor Township Disapproval of Subdivision Plan, 40 Del. Co. Repts. 106. We do not believe that that case is controlling. It was held in that case that it is not reasonable for a municipality to require a developer to construct a trunk line beyond his own development. It is true that in its discussion the Court commented on the fact that there were at that time no connecting sewers and that the segment involved would be simply a dead end sewer and that there was no evidence as to when, if ever, the connecting sewers would be built. However, in the present case the evidence shows that it is only a question of time until the Central Delaware County Authority Sewer will be extended.

We therefore find that it is reasonable municipal planning to require sanitary sewers to be constructed within a

development before streets are constructed, notwithstanding the fact that connecting trunk lines are not yet beyond the planning stage. In this particular case there is an additional reason justifying the Township's position. The tract in question consists of a shallow layer of top soil, several feet of decomposed mica schist, below which is undecomposed mica schist, which is hard rock, massive, tight and very deep. The layer of decomposed mica schist is very porous and sewage from cesspools would descend rapidly to the top of the undecomposed mica schist, which is impervious. The soil bacteria would have little chance to work on the sewage and it would run along the top of the undecomposed mica schist in practically a pure state and because of its close proximity to Trout Run it would be discharged into Trout Run in a few hours.

It follows that under all the evidence it is not unreasonable, arbitrary or capricious to require the construction of sanitary sewers within the development prior to the approval of the subdivision plan submitted.

Conclusions of Law.

1. Because of the rapid development of the area in which the appellant's property is situated, it is reasonable municipal planning to require sanitary sewers to be constructed within the development and before streets are constructed, notwithstanding the fact the trunk lines are not yet beyond the planning stage.

2. Under all the evidence it is not unreasonable, arbitrary or capricious to require the construction of sanitary sewers within the development prior to the approval of a subdivision plan.

3. The appeal should be dismissed at the cost of the appellant.

DECREE NISI.

AND NOW, to wit: December 17th, A. D. 1953, upon consideration of the foregoing case, it is ordered, adjudged and decreed that the appeal of Saxony Construction Company from the refusal of the Board of Supervisors of Marple Township to approve a certain subdivision plan be and it is hereby dismissed.

The appellant shall pay the costs.

ORDER.

The Clerk of Court is directed to give notice immediately to the parties or their attorneys of record of the filing of the above Decree Nisi and if no exceptions be filed thereto within ten days after the service of such notice to enter the Decree Nisi as a final decree.

HAROLD L. ERVIN,
President Judge.

APPENDIX B.

IN THE COURT OF QUARTER SESSIONS OF THE PEACE IN AND FOR THE COUNTY OF DELAWARE, PENNSYLVANIA.

APPEAL OF SAXONY CONSTRUCTION COMPANY FROM REFUSAL OF THE BOARD OF SUPERVISORS OF MARPLE TOWNSHIP TO APPROVE A CERTAIN SUBDIVISION PLAN.	Misc. Q. S. Docket A-18 Page 437. June Sessions, 1953.

OPINION.

Saxony Construction Company, Appellant, owners of a tract of land in Marple Township, submitted under Ordinance No. 49 a plan for subdivision of Section "K" of said tract, known as Rose Tree Woods in said Township. The Township Supervisors approved said plan, upon condition that Saxony would construct local sanitary sewer lines within the boundary of the streets appearing on said plan. The Supervisors agreed to issue building permits for the construction of twelve houses in the tract, on condition that streets and cartways should not be constructed until this Appeal should be heard and disposed of by final judgment of a court of final resort. Saxony was permitted also to install cesspools or septic tanks to permit immediate use of these houses because there was no trunk line sewer to which the local sewer lines could be connected in the immediate future.

Saxony appealed to this court and complained of the Township's requirement that sanitary sewers be installed when the streets are laid. After hearing and submission of requests for Findings of Fact and Conclusions of Law this Court, Ervin P. J., adjudicated that under the facts it is reasonable municipal planning to require sanitary sewers to be constructed within the development, and the Appeal should be dismissed. Appellant filed Exceptions which have

now been argued before the court en banc with written briefs having been filed by both sides. These Exceptions are now ready to be disposed of.

This case does not involve a question of requiring the developer to construct a trunk line or interceptor sewer outside of the boundary lines of his own property. It deals with a requirement of the Township that before the streets and cartways are laid out and completely paved that local sanitary sewer lines be laid and constructed in the bed of each street. This requirement is the ordinary and usual one specified by most Townships in order that the subdivision plan may be approved and the said streets eventually taken over by the Township after all the utilities including local sanitary sewer lines have been installed and approved. The Appellant certainly could have no valid objection to the requirement that he construct local sanitary sewer lines in his development if there were no other facts in the case which said Appellant says should act to excuse him from constructing the sewer lines at this time. He contends that the requirement is arbitrary and unreasonable in this case because of the fact that at the present time there are no sewage disposal facilities such as trunk lines and laterals to which a sewage system installed in his property can be connected. The most feasible sewer connection is with the Central Delaware County Sewer Authority, the present terminus of which line is approximately four miles away. He further says that the area of his building lots is such that the use of cesspools or septic tanks is a sanitary and safe method of sewage disposal and that the public health would be properly safe-guarded, as the Delaware County Planning Commission has ruled that lots of 10,000 square feet or more in area can safely be equipped with on the site sewage disposal by use of cesspools and septic tanks. The Appellant's lots vary from 12,000 square feet up to approximately 20,000 square feet. The Appellant further says that it is unreasonable to require him to pay to construct sanitary sewer lines in the bed of the streets and also

to pay to construct a cesspool or septic tank on each property and that this amounts to double assessment or taxation for an improvement which does not service his property.

The authority upon which the Township acted is found in Article XIX-A, which was added to the Second Class Township Code by the Act of May 24, 1951, P. L. 370, Sec. 16, Sec. 1206-A-(c) (53 P. S. 19093, 1256). This provides that the Township, before approving any subdivision plan for recording, shall among other things require that . . . "sanitary sewers and storm sewers, shall have been installed in strict accordance with the standards and specifications of the Township, or that the Township be assured by means of a proper completion guarantee . . . that the said improvements will be installed by the owner".

There is no question, therefore, but that the Township had the authority to require the construction of the sanitary sewers under the provisions of the Code. The real question now is, can the Township require the local sewer lines to be built before a connecting trunk line or interceptor line is in existence, ready to serve the Appellant's property?

We are of the opinion that this question must be answered in the affirmative and the Exceptions heretofore filed by the Appellant must be dismissed. We will not discuss each exception separately as the answer to the problem is found in the fundamental law controlling the police power and its application to municipal improvements designed to protect the public health, safety, morals and welfare. The authority is recognized, but how it is exercised may at times be questioned.

The Pennsylvania Supreme Court has passed on this question in the case of Oil City Appl. v. Oil City Boiler Works, 152 Pa. 348, 353, in the following language:

> "As we have seen, the authority 'to cause sewers of all kinds to be constructed or reconstructed,' is vested exclusively in councils. In the exercise of their legislative judgment, enlightened by the skill and experience of the city engineer, they have an undoubted

> right to adopt a system of sewerage for each sewer district, and in doing so determine the location of main, as distinguished from merely local or lateral sewers. Whether a main sewer or a merely local or lateral one is necessary on a particular street or portion of a street is a question of engineering and legislative judgment, vested exclusively in councils, and not reviewable, except under extraordinary circumstances. . . ."

Whether or not a "proper" outlet has been provided for a proposed sewer is a matter left to the discretion of the village authorities, with which the court will not interfere by injunction restraining the construction of the sewer, unless such discretion has been grossly abused. Johnson v. Avondale, 1 Ohio C. C. 229.

A municipal board has the power to contract for the construction of a sewer, although it has no outlet except through a plan or system of which it is a part but which cannot be completed; since it is open to the board to adopt plans to dispose of sewage in some other mode, and may gather it for that purpose. Harney v. Benson, 113 Cal. 314, 45 Pac. 687.

The fact that each of the Appellant's properties will have to be serviced by two methods of sewage disposal is advanced earnestly by him as a reason why such requirements are unreasonable, unjust and oppressive. We cannot agree with the Appellant that he is being victimized or treated unfairly. Let us suppose that the Township relaxed its regulations as to local sewer lines and were to approve the subdivision plan provided cesspools or septic tanks only were permitted. The record in this case shows that the population growth in Marple Township is increasing at an exceptional rate and that within a reasonably short time the entire Township will have to be equipped with sanitary sewers. Eventually sewers will have to be installed in the tract of the Appellant and then the cartway of each street

would have to be excavated at increased cost and inconvenience. The individual property owner would then be liable for the increased cost of the sewer line at that time. Under the present regulations the sewer line will be installed in the streets before they are paved and will cost less and obviate the necessity of tearing up paved streets. The installation of the sewer line will add value to each property and every likely the cost of same can be absorbed in the sale price of each property.

A search of the cases has not disclosed a case in point on this specific question in Pennsylvania. However, a case closely in point was decided by the Illinois Supreme Court in City of Chicago v. Hirschl, 275 Ill. 60, 113 N. E. 899. The city ordained that in wide streets two water mains would have to be installed, one on each side. The reason advanced for this was that most wide streets would accommodate trolley lines and, to permit only one water main would result in inconvenience and hazard when the trolley tracks would have to be disturbed to reach the water main. In narrow streets only one water main was required by the city regulations. The plaintiff appealed the regulation as unreasonable, unjust, oppressive and discriminatory. The Supreme Court said no in the following language:

> "We cannot say that an ordinance requiring two water mains in a street is so unreasonable as to constitute an abuse of discretion by the council or an arbitrary imposition of an unjust burden upon the owners of property. The necessity, character and extent of the improvement are committed to the judgment of the city council, and their judgment is conclusive, unless the court is clearly satisfied that their action has been oppressive and without reasonable grounds. This case is not of that character. There may be a fair room for difference of opinion as to the desirability of having two water mains, but we cannot say that the decision of that question by the council was unreasonable, unjust or oppressive."

The record in the case at bar indicates that the Supervisors of Marple Township have not and are not now dealing with the Township sewer problem haphazardly. On the contrary, much consideration and intelligent application has been put forth in an endeavor to serve and protect the public interests and to prevent the occurence of future inequities. It certainly amounts to intelligent and proper municipal management to require a developer of land in the Township to install all of the required utilities, etc. that are usually a part and parcel of modern living. If the developer does not do this, then it remains for the unfortunate individual property owner to foot the bill at some future date and, usually at greatly increased cost.

The Exceptions filed by the Appellant to the Adjudication of this court heretofore handed down must be dismissed. Therefore the following is made:

FINAL DECREE.

AND NOW, to wit: this 27th day of April A. D. 1954, a Decree Nisi having been filed in the above case on December 17, 1953 and certain exceptions thereto having been filed on behalf of the Appellant Saxony Construction Company and the said matter having been argued before the Court en banc and after due consideration it is hereby ORDERED, ADJUDGED and DECREED:

(1) That the Exceptions filed in the said case be and the same are hereby dismissed, and;

(2) The appeal of said Saxony Construction Company from the refusal of the Board of Supervisors of Marple Township to approve a certain subdivision plan be and it is hereby dismissed.

The Appellant shall pay the costs.

(3) An exception is hereby allowed to Saxony Company to the action taken by the Court herein.

By THE COURT,
WM. R. TOAL,
Judge.

APPENDIX C.

No. 113

IN THE SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT.

IN RE: APPEAL OF SAXONY CONSTRUCTION COMPANY FROM DECREE DISMISSING APPEAL FROM BOARD OF SUPERVISORS OF MARPLE TOWNSHIP.	No. 44 October Term, 1955.

Appeal from the Final Decree of the Court of Quarter Sessions of the Peace in and for the County of Delaware as of June Sessions, 1953, Misc. Q. S. Docket A-18, Page 437.

FILED: April 18, 1955.

Opinion by WOODSIDE, *J.*

This is an appeal by the Saxony Construction Company from the decree of the Quarter Sessions Court of Delaware County dismissing its appeal from the refusal of the board of supervisors of a second class township to approve a subdivision plan submitted to the supervisors by the company.

Paragraph (c) of Section 1206-A, added to The Second Class Township Law of May 1, 1933, P. L. 103 by the Act of May 24, 1951, P. L. 370 § 16, 53 P. S. § 19093-1256, provides that the board of township supervisors before approving any such plan "shall either require that the necessary grading, paving and other street improvements, including, where specified by the board, . . . sanitary sewers and storm sewers shall have been installed in strict accordance with the standards and specifications of the township" or

that the township receive guarantee that it will be done. Section 1140 of The Second Class Township Law, supra, as amended 53 P. S. § 19093-1140 provides for the approval by township supervisors of plans for roads to be constructed, opened or dedicated in the township.

When the construction company submitted its subdivision plan, which included roadways, to the Board of Supervisors of Marple Township the supervisors approved it *provided* that a sanitary sewer be installed by the construction company within the boundaries of the streets appearing in said plan. This amounts to a refusal *unless* the appellant complies with the conditions.

There is no sanitary sewer system in the immediate vicinity with which the sewer pipes required by the supervisors to be installed by the appellant could be connected, nor has the township made any legally binding commitments for the construction of, or connection with any such system. The sewers thus required could not be presently used.

The appellant, contending that under all the circumstances the requirement of the supervisors was arbitrary, capricious, unreasonable and without legal authority, appealed to the Quarter Sessions Court of Delaware County. Paragraph (f) of the aforesaid section 1206-A (53 P. S. § 19093-1256(f) provides for appeal as follows:

> "In any case where the board of township supervisors disapproves a subdivision plan, any person aggrieved thereby may, within thirty days thereafter, appeal therefrom, by petition to the court of quarter sessions of the county, which court shall hear the matter de novo and after hearing enter a decree affirming, reversing or modifying the action of the board, as may appear just in the premises. The court shall designate the manner in which notices of the hearing of any such appeal shall be given to all parties interested. The decision of the court shall be final."

Section 1141 of The Second Class Township Law, supra, as amended, 53 P. S. § 19093-1141 provides for an

appeal in practically the same language from refusal of the township supervisors to approve road plans under section 1140, supra.

The Quarter Sessions Court of Delaware County after hearing de novo, decree nisi and argument before the court en banc dismissed the appeal.

Both the aforesaid sections provide that the decision of the Quarter Sessions Court shall be final. This has the same effect as if the legislature had said that no right of appeal is permitted. White Township School Directors Appeal, 300 Pa. 422, 150 A. 744 (1930). Where the legislature expressly denies the right of appeal, this court's scope of review is limited to the question of the lower court's jurisdiction and the regularity of the proceedings; the merits of the controversy cannot be considered.

In Kaufman Construction Co. v. Holcomb et al., 357 Pa. 514, 517, 518, 519, 55 A. 2d 534 (1947) the present Chief Justice of our Supreme Court said: "Where a statute expressly denies the right of appeal to a court from the action of some agency of government, or to an appellate court from the decision of a court of original jurisdiction, to what extent is a disappointed claimant thereby prevented from obtaining a complete judicial review of his claim? After some vacillation by the courts in regard to the proper answer to that question (citing), the law is now reasonably clear, a distinction being made between the effect of a statute which merely fails to provide for a right of appeal and the effect of one which expressly denies that right . . . The distinction thus made has been reiterated and reinforced in a multitude of subsequent cases holding that where a statute expressly provides that there shall be no appeal the scope of appellate review is limited to the question of jurisdiction and the regularity of the proceedings; the merits of the controversy cannot be considered even though the interpretation given to the facts or the law by the governmental agency or the court below may have been erroneous. It is only where the statute is silent on the ques-

tion of appeal that a review by certiorari may be had 'in the broadest sense' and the court may consider the record, including the testimony, to determine whether the findings are supported by competent evidence and to correct any conclusions of law erroneously made."

This has been repeated as late as 1954 in Delaware County National Bank v. Campbell, 378 Pa. 311, 316, 106 A. 2d 416 (1954). See also Twenty-first Senatorial District Nomination, 281 Pa. 273, 126 A. 566 (1924); Grime v. Dept. of Public Instruction, 324 Pa. 371, 375, 188 A. 337 (1936).

The federal constitution does not require the legislature to give a litigant an appeal from a lower court. Hibben v. Smith, 191 U. S. 310, 317, 24 S. Ct. 88 (1903); Spaulding v. Douglas Aircraft Co., 154 F. 2d 419, 427 (1946).

The questions argued before us relate to the merits of the controversy and not the jurisdiction or the regularity of proceedings. There thus being no contention concerning the only questions we could consider,

The appeal is dismissed.

Rhodes, P. J. and Wright, J. concur in the result.

Ervin, J. took no part in the consideration or decision of this appeal.

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HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

October Term, 1955

No. 694

SAXONY CONSTRUCTION COMPANY,
Appellant

v.

BOARD OF SUPERVISORS OF MARPLE TOWNSHIP,
Appellee

MOTION TO DISMISS APPEAL

Appeal from the Court of Quarter Sessions of Delaware County, Pennsylvania.

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MOTION TO DISMISS APPEAL

FORMAL MOTION

Appellee in the above entitled case moves the United States Supreme Court to dismiss the appeal on any or all of the following grounds:

1. The appeal was not taken within the time provided by law;

2. The appeal does not present a substantial Federal question;

3. Any possible Federal question sought to be reviewed was not timely or properly raised or expressly passed on in the court below;

4. The judgment appealed from rests on an adequate non-Federal basis;

5. The appeal is not within the jurisdiction of this Court because it was not taken in conformity to statute or to rules.

THE OPINIONS BELOW

Copies of the opinions, decrees, and orders of the lower courts are included in the Appendix of Appellant's Statement as to Jurisdiction. For purposes of the Appellee's argument herein on the jurisdiction question a copy of Appellant's Exceptions to the Decree Nisi of the Quarter Sessions Court is included as Appendix A.

The record shows that by Order entered May 24, 1955, the Supreme Court of Pennsylvania refused Appellant's appeal from the Superior Court. On June 16, 1955, the Appellant petitioned the said Court to reconsider. The petition was refused by order of September 29, 1955. No opinions were filed with these orders.

The time allowed for appeals to the Supreme Court of the United States is prescribed by 28 U.S.C. Section 2101. In this case the appeal must be taken within ninety days after the entry of judgment below. See Appendix B herein.

STATEMENT OF THE CASE

In Delaware County, Marple Township, Springfield Township, Nether Providence Township and Upper Providence Township abut on the reservoir of the Philadelphia Suburban Water Company on Crum Creek. The boundaries of each township in effect form a V or pie-shaped wedge and when the four are viewed on a map of Delaware County their boundaries form a rough X with the reservoir in the center. Marple lies to the north, Springfield to the east, Nether Providence to the south and Upper Providence to the west.

Crum Creek is that leg of the X running from the northwest to the southeast. Trout Run is a tributary of Crum Creek and is entirely within Marple Township. The Run flows practically due south into Crum Creek. There is another small stream that is tributary to Trout Run flowing westwardly into it and lapping the edge of Appellant's subdivision. The drainage of Appellant's property is entirely into this water-shed.

The Central Delaware County Sewer Authority owns and operates a sewage treatment plant and a trunk line sewer main extending from the treatment plant northwardly about eight miles to a point within about four miles from Appellant's land. This trunk line, with the approval of the State Sanitary Water Board, was designed to service the entire area contributory to the trunk line, including the area and the property now in question.

Statement of the Case

The trunk line sewer extension necessary to serve Appellant's subdivision will extend from the present northerly terminus of said trunk line in an up-stream direction, an overall distance of about four miles, where it will be connected with the local sewer lines constructed within Appellant's subdivision and other adjoining lands. This trunk line extension has not been laid, but it has been found as a fact that it is in a definite and active planning stage and every continuous effort is being made to make it a reality within a reasonable time. Under the Marple Township regulations building areas can be subdivided into lots of twelve thousand square feet or less if the subdivider provides for connection to a municipal sewer or installs local sanitary sewer lines to be joined later on to the trunk lines as and when such trunk lines become available.

In the instant case Appellant's application for approval of his subdivision plan was approved upon condition that if he chose immediately to subdivide and develop the tract into twelve thousand foot lots he could do so if he installed the necessary local sanitary sewer lines as part of the development. Provision was made to permit immediate occupancy of houses to be constructed within the development by permitting the temporary use of individual cesspool and septic tanks pending connection of the sewer lines to trunk lines to be constructed. Appellant's plan for the subdivision calls for lots of twelve thousand square feet area.

In view of the rapidly increasing population and development of the Township, its proximity and drainage into the water supply and the condition of the soil it is

inevitable that an overall sewage system rather than individual on-site disposal units be established. To allow the construction of streets in the area without the laying of local sewer pipes under these circumstances would be extremely short sighted and inadequate Township planning. It would subject the public to the additional expense and inconvenience that would be occasioned by tearing up the streets to put in the lines and then having to reconstruct the streets when all this can be avoided by requiring the local sewer lines to be laid with the street in the first instance.

ARGUMENT ON THE JURISDICTIONAL QUESTION

It is submitted that the appellant has not taken this appeal within the time set by law and furthermore that this case is not within the purview of the Statute 28 U.S. C.A. Section 1257, nor taken in accordance with Rule 16 of the United States Supreme Court.

I. The appeal to the United States Supreme Court was not taken within the time fixed by law for the taking of an appeal from the state court's decision.

The docket entries show that the State Supreme Court refused the appeal from the Superior Court by Order entered May 24, 1955. Rules 69 and 73 of the Supreme Court of Pennsylvania, as set forth in Appendix C and D herein, provide that a petition for reargument must be filed before the record is returned to the lower court and that the record will be returned after ten days following the final Order unless such a petition is filed. In the instant case the appellant never filed a petition for reargument and a docket entry shows the record remitted on June 6, 1955.

On June 16, 1955, i.e. twenty-three days after the Order, the appellant filed a petition to reconsider. The Rules of the Supreme Court of Pennsylvania do not provide for such a petition, but even if it were considered in the

nature of a petition for reargument it would not stand in the face of the obvious defect that it was not filed in time. Any other conclusion would preclude any order of the Supreme Court of Pennsylvania from becoming final until such a petition to reconsider had been filed, and this is clearly not in accord with Rule 73. The Supreme Court of Pennsylvania denied the petition on September 29, 1955, but the final order refusing the appeal was entered May 24, 1955. The Notice of Appeal to the Supreme Court of the United States was filed December 21, 1955, well after the expiration of the ninety days limit set by law.

II. The decision appealed from did not draw in question the validity of a statute of the state on the ground of its being repugnant to the Constitution, treaties or laws of the United States. The appeal does not present a substantial Federal question and any conceivable Federal question sought to be reviewed here was not timely or properly raised or expressly passed on in the court below.

The United States Supreme Court has set forth certain requirements of particularity which must be met in framing the Federal question. In *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 the court stated:

> "The jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right".

Nor will a mere reference to the Constitution of the United States or the Constitution and laws of the United States or due process of law sustain the jurisdiction of the United States Supreme Court. *Herndon v. Georgia,* 295 U.S. 441, 442-3; *Oxley Stave Co. v. Butler County,* 166 U.S. 648; *Bowe v. Scott,* 233 U.S. 658, 664-5.

Furthermore, it is well settled in this court that it must be made to appear that some provision of the Federal as distinguished from the State Constitution was relied upon and that such provision must be set forth. *New York Central & H. R. Co. v. New York,* 186 U.S. 269, 273.

The Appellant's Petition and Appeal From Refusal to Approve Subdivision Plan addressed to the Court of Quarter Sessions of the Peace and a part of the record in this case does not fulfill the requirements of the United States Supreme Court as set out in the above cases. Nowhere does the Petition even refer to the United States Constitution, any language of the Constitution or any phrase from it. The adjudication, the Decree Nisi, the Order, the Appellant's Exceptions, the Opinion and the Final Decree—all papers of record and certified to the United States Supreme Court in this case—make no reference to any Federal question, or any portion of the Constitution of the United States; nor do they draw in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States. Thus, the final decree of the Court of Quarter Sessions and the proceedings therein from which this opinion is taken raise no Federal question and pass on no Federal question.

The first time the Appellant ever alleges or refers to any constitutional or Federal question is in his appeal to

the Superior Court of Pennsylvania. See pages 6 and 7 of Appellant's Statement as to Jurisdiction. In the Pennsylvania court system questions and objections not raised in the court below will not be considered on appeal. An appellate court in Pennsylvania does not raise questions de novo, but reviews those tried and considered in the court below. An appellate court will refuse to consider questions which were not raised by the pleading or at the trial of the cause or which were not urged or argued in the court below. The Pennsylvania cases enunciating these principles of law are legion. Some of them are cited here:

Levenite v. Lancaster, 215 Pa. 576, 74 A. 782;

Woldow v. Dever, 374 Pa. 370, 97 A. 2d 777;

McLaughlin v. Monaghan, 290 Pa. 74, 138 A. 79;

Kascak v. United Societies, 117 Pa. Super. Ct. 423, 177 A. 338;

Spitzer v. Philadelphia Transp. Co., 348 Pa. 548, 36 A. 2d 503;

Grisbord v. Philadelphia, 148 Pa. Super. Ct. 91, 24 A. 2d 646;

Muse-Art Corp. v. Philadelphia, 373 Pa. 329, 95 A. 2d 542;

Montgomery Co. B. Assn. v. Rinalducci, 329 Pa. 296, 197 A. 94;

Middletown Boro. v. Pa. P.U.C., 143 Pa. Super. Ct. 444, 17 A. 2d 904.

The United States Supreme Court has ruled that the time and place to raise the Federal question in the State Court is determined by State practice. *Hulbert v. Chicago,* 202 U.S. 275; *Edelman v. California,* 344 U.S. 357. Where

the Federal question is initially raised in a petition or assignment of error filed in the highest court of the State which refuses to consider any issue not presented to the trial court the jurisdiction of the United States Supreme Court cannot attach. *Bailey v. Anderson,* 326 U.S. 203, 206-7; *Radio Station WOW v. Johnson,* 326 U.S. 120, 128; *Herndon v. Georgia,* 295 U.S. 441, 443. Moreover, briefs and oral arguments before State courts are not ordinarily part of the record filed with the Supreme Court of the United States and cannot be used to establish that a Federal question was raised. *Live Oak Ass'n. v. Railroad Commission,* 269 U.S. 354, 357-8; *Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54. The mere citation in the State Court's opinion of the United States Supreme Court cases is not enough to establish jurisdiction. *Osborne v. Clarke,* 204 U.S. 565, 567-8. Review in the United States Supreme Court is limited to the specific questions which were properly raised in the state courts. *Whitney v. California,* 274 U.S. 357, 362-3; *Adler v. Board of Education,* 342 U.S. 485, 496. An appellant cannot raise a Federal issue in the United States Supreme Court when it was not raised or decided below, even though he could have raised it below. *Dewey v. Des Moines,* 173 U.S. 193, 198.

Since the record in the Court of Quarter Sessions of the Peace is clearly devoid of the mention or raising of any specific federal question or language from the United States Constitution, the above decisions of the Supreme Court of the United States establish that no Federal question was involved in the decision from which this appeal is taken.

In his Statement as to Jurisdiction, the Appellant cites several cases as sustaining the jurisdiction of this

Court on his appeal. A reading of the opinions in two of them, *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, and *Ex parte Williams*, 277 U.S. 267, does not disclose that the issue of properly raising the Federal question appeared. In another, *Poulos v. New Hampshire*, 345 U.S. 395, the appellant had alleged in his complaint that his freedom of speech, assembly and worship and his rights under the Bill of Rights and the First and Fourteenth Amendments of the United States Constitution had been violated. In still another, *Atchison, Topeka & Santa Fe Ry. Co. v. P.U.C. of California*, 346 U.S. 346, due process and interstate commerce questions under the United States Constitution had been squarely raised in the courts below. Thus, these cases cannot help the Appellant in showing that he has raised a Federal question in this case, since he has not done what was done by the appellants in the cases he cites.

In no way is this motion to be considered an admission that Appellant's position can be sustained on the merits. Although much of Appellant's Statement as to Jurisdiction involves argument directed to the merits of the case, this Motion is not concerned with such an argument because the jurisdictional question is the only one sought to be placed before the United States Supreme Court at this stage of the proceedings.

CONCLUSION

It is respectfully submitted that the Appellant presents no case where there is drawn in question the validity

of any State statute on the ground of its being repugnant to the Constitution of the United States and that the decree and proceedings in the court below raise no Federal question and pass on no Federal question. Furthermore the appeal was not taken within the time fixed by law. Therefore, the Appellant's appeal to the United States Supreme Court should be dismissed and the decree of the lower court be affirmed.

Respectfully submitted,

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APPENDIX A

In The Court of Quarter Sessions, etc., of Delaware County, Penna.

APPELLANT'S EXCEPTIONS

To the Honorable Judges of the said Court:

The appellant, SAXONY CONSTRUCTION COMPANY, makes the following exceptions to the Adjudication, Findings of Fact, Conclusions of Law, Discussion and Decree Nisi in the above captioned case:

1. The appellant excepts to the following Findings of Fact contained in the Adjudication dated December 17, 1953.

5. Owner also owns an adjoining area which can be subdivided into five additional lots.

21. The construction of a sanitary sewer from the present interceptor sewer terminus to Section "K" would require approximately from 120 to 140 days.

22. The present Central Delaware County Authority Sewage treatment plan, is designed to have a capacity to accommodate a 70,000 population.

23. The said interceptor sewer was designed and is sufficiently large to accommodate and meet the sanitary sewer requirements of the up stream areas.

24. Preliminary engineering and related studies for the extension of the said interceptor sewer are now being made and have progressed without delay.

31. If such installation is after the streets are constructed, the cost will be at least $1½ per foot of frontage additional, aside from the then damage to paved cartways.

32. Owner has graded a large portion of Section "K" to solid rock, pushing the earth to other areas within Section "K" to various depths up to six feet.

33. Before being disturbed by grading the geological structure of the soil consisted of a shallow layer of top soil, several feet of decomposed mica schist, below which is undecomposed mica schist, which is hard rock, massive, tight and very deep.

34. Test borings in Section "K" show that the layer of decomposed mica schist is very porous and that sewage from cesspools would descend rapidly to the top of the undecomposed mica schist, which is impervious; that the soil bacteria would have little chance to work on the sewage and that it would run along the top of the undecomposed mica schist in practically a pure state and would be discharged into Trout Run in a few hours.

37. The area has developed so rapidly that it is reasonable municipal planning to require sanitary sewers to be constructed within the development and before streets are constructed, notwithstanding the fact that trunk lines are not yet beyond the planning stage.

38. Under all of the evidence, it is not unreasonable, arbitrary or capricious to require the construction of sanitary sewers within a development prior to the approval of a subdivision plan.

2. The appellant takes exception to the failure of the Court to make the following Findings of Fact.

13. The Township can make no commitment to construct the sewer trunk lines which would serve Section "K" (N.T. 17, 180, 186).

14. Marple Township is not one of the several municipalities which constitutes the Central Delaware County Sewer Authority (N.T. 104).

17. Approximately 17,300 feet of such pipe is required in Marple Township (N.T. 106).

18. Central Delaware County Sewer Authority has never undertaken to construct sub-trunk lines which are exclusively within one township (N.T. 107).

19. The pipe from Crum Creek at Trout Run and along Trout Run to Section "K" is to be a sub-trunk line approximately 12,000 feet long entirely within Marple Township (N.T. 105, 106, 107).

20. Marple Township has not yet made a detail design of the pipe lines which might be placed in Trout Run (N.T. 107).

21. The Trout Run pipe would probably be 12 to 18 inches in diameter (N.T. 107).

22. Marple Township has made no specific plan of courses or distances for the construction of a Trout Run sewer pipe line (N.T. 108).

23. Central Delaware County Sewer Authority has plans only to extend the trunk line 5,300 feet to the Springfield Township line and no starting date or commitments have been made by the authority (N.T. 108, 109).

26. Marple Township has never made an on-the-ground survey for a pipe line along Trout Run (N.T. 111).

27. Marple Township is presently engaged in a One hundred eighty thousand and 00/100 ($180,000.00) dollar sewer construction job in the Edgewood Park section of the Township (N.T. 114).

28. It would take between 90 and 140 days to construct 12,000 feet of pipe line to Crum Creek after all preliminary engineering, ordinance, financing and right of way work was completed and about the same length of time to lay pipe from Trout Run to the present terminus of the Authority's pipe.

29. The Central Delaware County Sewer Authority spent One hundred sixty-five thousand and 00/100 ($165,000.00) dollars of its own money and one million two hundred thousand and 00/100 ($1,200,000.00) dollars of U. S. Government funds under W. P. A. Authority to construct ten miles of trunk lines during the depression (N.T. 123).

30. Neither Marple Township nor the Central Delaware County Sewer Authority have any expectation of such a government subsidy for construction of extensions of existing sewer lines (N.T. 123, 124).

31. After a period of five months unusually heavy rain (approximately 30 inches), test borings

were made in Section "K" and it was found that the soil is decomposed Wissahickon mica schist and that the percolation quality of the soil was excellent (N.T. pp. 24-30, 51).

32. Cesspools and septic tanks can work well in the soil contained in Section "K", both from the standpoint of disposal and purification (N.T. 33, 45).

35. The average size cesspool and septic tank can adequately handle the needs of a home built in Section "K" (N.T. 50).

36. There is no danger to the water supply in Crum Creek if cesspools and septic tanks in Section "K" are properly constructed (N.T. 58, 59, 74).

37. The sewage from cesspools in Section "K" will not pollute Trout Run or Crum Creek (N.T. 59, 60, 74).

38. The Delaware County Planning Commission requires a minimum area of 10,000 square feet in lots for which cesspools are intended—this is one-half of the requirement of Marple Township (N.T. 61).

39. If SAXONY CONSTRUCTION COMPANY is compelled to construct a blind sewer in addition to cesspools and septic tanks, the Veterans Administration would not include the cost of the blind sewer in the appraisal for mortgage purposes (N.T. 80, 81).

43. Under all of the evidence Marple Township has not shown that sewer connections can be made available to Section "K" within a reasonable time.

44. Under all of the evidence it is unreasonable, arbitrary and capricious for Marple Township to demand construction of a blind sewer in Section "K" at this time.

3. The appellant excepts to the following Conclusions of Law contained in the Adjudication of December 17, 1953.

1. Because of the rapid development of the area in which the appellant's property is situated, it is reasonable municipal planning to require sanitary sewers to be constructed within the development and before streets are constructed, notwithstanding the fact the trunk lines are not yet beyond the planning stage.

2. Under all the evidence it is not unreasonable, arbitrary or capricious to require the construction of sanitary sewers within the development prior to the approval of a subdivision plan.

3. The appeal should be dismissed at the cost of the appellant.

4. The appellant takes exception to the failure of the Court to make the following Conclusions of Law.

1. The action of the Supervisors of Marple Township was arbitrary, capricious, unreasonable and without legal authority.

2. Marple Township must approve the subdivision plan for Section "K" unconditionally, i.e., without requiring construction of sanitary sewers.

5. The appellant excepts to the Decree Nisi contained in the Adjudication of December 17, 1953.

> And now, to wit: December 17th, A.D. 1953, upon consideration of the foregoing case, it is ordered, adjudged and decreed that the appeal of Saxony Construction Company from the refusal of the Board of Supervisors of Marple Township to approve a certain subdivision plan be and it is hereby dismissed.
>
> The Appellant shall pay the costs.

6. The appellant takes exception to the ruling of the Court which prohibited the appellant from introducing testimony on the question of cost of construction of the sewer trunk lines and laterals.

7. The appellant reserves the right to file additional exceptions at the time of preparation of its brief.

Respectfully submitted,
JOHN R. GRAHAM,
Attorney for the Appellant.

APPENDIX B

U. S. Statutes 28 U.S.C.A. Section 2101 (c): Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

APPENDIX C

RULES OF THE SUPREME COURT OF PENNSYLVANIA

RULE 69. Petitions for reargument must be made before the record is returned to the court below, unless this court, upon cause shown, shall extend the time; and must specify particularly the point supposed to have been overlooked or misapprehended by the court (with a proper reference to the portions of the original Brief or Record relied on to establish the fact alleged) the reasons for a rehearing, and arguments in favor thereof. Attached thereto shall be a copy of all the opinions filed in the case; and, accompanying it, a copy of all the Briefs used in the argument of the case.

APPENDIX D

RULES OF THE SUPREME COURT OF PENNSYLVANIA

RULE 73. Unless otherwise ordered, the record in every case shall be remitted to the court from which the appeal was taken, at the expiration of ten days from the final order, judgment or decree of this court, unless there is pending a motion for reargument, or other motion affecting the order, judgment or decree, or a petition for an appeal to the Supreme Court of the United States, in which cases the record shall be held to await the disposition thereof; after which, if the motion or petition be refused, and ten days have elapsed since the entry of the final order, judgment or decree, the record shall be remitted forthwith to the court below.

FILE
MAY 3
HAROLD B. WILL

IN THE

Supreme Court of the United States

October Term, 1955.

No. 694.

SAXONY CONSTRUCTION COMPANY,
Appellant,

v.

BOARD OF SUPERVISORS OF MARPLE TOWNSHIP,
Appellee.

Brief in Opposition to Motion to Dismiss.

Appeal from the Court of Quarter Sessions of Delaware County, Pennsylvania.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS.

The substance of appellee's motion to dismiss is answered in appellant's statement as to jurisdiction. This brief is to supplement that statement.

1. Appellee's Statement of the Case Demonstrates That the Order Appealed from Is Unreasonable.

In its statement of the case, appellee has urged that although the trunk sewer line has not been laid, "it is in a definite and active stage and every continuous effort is being made to make it a reality within a reasonable time" (Motion to Dismiss, p. 4). This was the argument urged before the Quarter Sessions Court in June, 1953. Three years later there is no trunk sewer line to which appellant can connect, yet appellee is still arguing that effort is being made to complete it within a reasonable time. This passage of time with no appreciable advancement of appellee's plans has conclusively demonstrated that appellant was ordered to construct local sewer facilities in an area having no reasonable prospects for the construction of a trunk sewer within a reasonable time. The consummation of appellee's "plans" are as remote today as they were three years ago at the trial of this case.

2. The Appeal Was Timely.

The circumstances of the appeal to the Supreme Court of Pennsylvania, which are set out in appellant's statement as to jurisdiction, firmly establish that that court retained control of this case until its refusal on September 29, 1955, of appellant's petition to reconsider. That petition had

been filed pursuant to the recommendation of the Chief Justice of the Supreme Court of Pennsylvania. Rules 69 and 73 of the Supreme Court of Pennsylvania are inapplicable. Rule 69 specifies the time within which a petition for reargument must be filed. Such a petition must be filed before the Supreme Court remits the record to the court from which the appeal was taken, which, by Rule 73 is set at ten days after "the final order, judgment or decree of" the Pennsylvania Supreme Court. These provisions concern petitions filed after a perfected appeal has been argued and determined. In this case, although the Pennsylvania Supreme Court considered and dismissed two petitions for the allowance of an appeal, no such appeal was allowed or argued and Rules 69 and 73 have no application. The control of the state supreme court over the proceeding was based upon its constitutional and statutory supervisory powers over all inferior courts of the state. Appellee cannot be heard to argue that a decision of a lower court was final notwithstanding the recommendation of the Chief Justice of the state supreme court for filing a second petition for allowance of appeal, which was considered and passed upon by that court. *U. S. v. Ellicott*, 223 U. S. 524, 32 S. Ct. 334, 56 L. Ed. 535 (1912); *Bowman v. Loperena*, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177 (1940).

It is the burden of a party appealing from a judgment of a state court to show affirmatively that the Supreme Court has jurisdiction. *Gorman v. Washington University*, 316 U. S. 98, 100-101, 62 S. Ct. 962, 963-964, 86 L. Ed. 1300, 1302 (1942); *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 651, 62 S. Ct. 857, 859-860, 86 L. Ed. 1090, 1094 (1942). If an otherwise final judgment of an inferior court is susceptible to review in the discretion of a higher state court, there must be an affirmative showing that there was a proper attempt to secure that review, *Fisher v. Perkins*, 122 U. S. 522, 525, 7 S. Ct. 1227, 1229, 30 L. Ed. 1192 (1897), and a similar showing that rights of appeal were taken, or

that none existed, must be made. *Gorman v. Washington University, supra.* Appellant's petitions for appeal to the state supreme court were necessary to demonstrate the exhaustion of all possible state remedies. *American Ry. Express Co. v. Levee,* 263 U. S. 19, 44 S. Ct. 11, 68 L. Ed. 140 (1923); *Department of Banking v. Pink,* 317 U. S. 264, 63 S. Ct. 233, 87 L. Ed. 254 (1942).

3. The Federal Question Was Raised and Passed Upon by the State Court Within the Meaning of 28 U. S. C. A. 1257(2).

It is not necessary that the federal question appear on the record, nor that the decision be made in direct and positive terms, ipsissimis verbis. It is sufficient if it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to support the judgment. *Crowell v. Randell,* 35 U. S. 368, 398 (10 Pet.), 9 L. Ed. 458, 470 (1836); *Murray v. Charleston,* 96 U. S. 432, 24 L. Ed. 760, 762 (1878); *Eureka Lake and Yuba Canal Co. v. Superior Court,* 116 U. S. 410, 415, 6 S. Ct. 429, 431, 29 L. Ed. 671 (1886).

In *Kaukuna Water Power Co. v. Green Bay & M. Canal Co.,* 142 U. S. 254, 12 S. Ct. 173, 35 L. Ed. 1004 (1891), the court said at page 269:

> "This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court."

Trial of this case in the quarter sessions court upon the question of the "fundamental law controlling the police power"[1] was an adequate presentation of the issue of due process under the federal constitution for purposes of

1. Record, p. 174; Statement of the Case, Appendix B, p. 25.

Pennsylvania practice. That issue would have been treated by the appellate courts of Pennsylvania as sufficiently raised for their review had the appeal not been dismissed on the non-federal ground that statutory limitations upon the scope of this review prevented consideration on the merits. The dismissal of the state appeal upon this ground was entirely unforeseeable under the statutes and cases of Pennsylvania at that time. Pennsylvania superior court cases had previously granted full review of constitutional questions in similar appeals from the quarter sessions courts. In the initial argument on the appeal to the Superior Court, the argument of both parties was concerned with the merits only, including the question whether the appellee's order was repugnant to the Fourteenth Amendment. Later, the parties were notified by that court that it desired to hear reargument "as to the scope of appellate review". After the reargument ordered by the court it dismissed the appeal without consideration of the merits.

Appellant then sought review by the Pennsylvania supreme court, which appeared to be a matter of right under the Pennsylvania Act of June 24, 1895, P. L. 212, Section 7(e), 17 Purdon's Pa. Stat., Section 190. This act provides for appeal to the supreme court from the superior court, as follows:

> "Nevertheless in any action or proceeding whatever above committed to the final and exclusive decision of the said court [superior court], there may still be an appeal from its judgment to the supreme court:
>
> First. If the jurisdiction of the superior court is in issue; or
>
> Second. If the case involves the construction or application of the constitution of the United States or of any statute or treaty of the United States; or
>
> Third. If the case involves the construction or application of the constitution of Pennsylvania; or

> Fourth. If the appeal to the supreme court be specially allowed by the superior court itself or by any one justice of the supreme court."

Nevertheless review was refused by the supreme court.

Federal rights are denied as well by a refusal of a state court to decide questions presented as by an erroneous decision of them. *Lawrence v. State Tax Commission of Miss.*, 286 U. S. 276, 282, 52 S. Ct. 556, 558, 76 L. Ed. 1102, 1107 (1932).

Appellant's right of appeal to this Court cannot be denied by the failure of the trial court to phrase the police power question in terms of the federal constitution, particularly where that question has been adequately raised for purposes of state appellate review and where it appears that such review was denied in order to avoid passing upon the federal question. Thus the jurisdiction of this Court is sustained where it appears that the refusal of a state appellate court to pass upon a federal question was an evasion of that issue, and its ruling that the question was not properly raised in the trial court was resorted to merely to give color to its refusal. *Rogers v. Alabama*, 192 U. S. 226, 230-231, 24 S. Ct. 257, 258-259, 48 L. Ed. 417, 418-419 (1904); *National Mutual Building & Loan Association v. Brahan*, 193 U. S. 635, 646, 24 S. Ct. 532, 535, 48 L. Ed. 823, 828 (1904). This is so as to any insubstantial non-federal ground. *Brown v. Western Ry.*, 338 U. S. 294, 298-299, 70 S. Ct. 105, 107-108, 94 L. Ed. 100, 104 (1949); *Davis v. Wechsler*, 263 U. S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143, 145 (1923); *Angel v. Bullington*, 330 U. S. 183, 188, 67 S. Ct. 657, 660, 91 L. Ed. 832, 836 (1947). In *Rogers v. Alabama, supra*, Justice Holmes said at page 230:

> "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

Wherefore, appellant respectfully submits that the motion to dismiss should be denied and the case heard on briefs and oral argument.

Respectfully submitted,

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No. 694. SAXONY CONSTRUCTION CO. *v.* BOARD OF SUPERVISORS OF MARPLE TOWNSHIP. Appeal from the Court of Quarter Sessions of Delaware County, Pennsylvania. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Bruce H. Greenfield* for appellant. *Joseph D. Calhoun* for appellee.